STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

-vs-

NICHOLAS JACKSON,

Defendant/Appellant.
_____/

Supreme Court No.: 125250

C.A. No.: 242050

Circuit Court No.: 01-177534-FC

MUSILLI, BRENNAN & LETVIN, PLLC
RALPH MUSILLI, P18132
DENNIS M. FULLER, P40666
Attorney for Defendant/Appellant
24001 Greater Mack Avenue
St. Clair Shores, Michigan 48080
(586) 778-0900

CHERYL A. MATTHEWS, P44761
Prosecuting Attorney
1200 N. Telegraph Road
Pontiac, Michigan 48341
(248) 858-0656
_____/

125250

DEFENDANT'S SECOND SUPPLEMENTAL BRIEF

MUSILLI, BRENNAN & LETVIN, PLLC
24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

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MUSILLI, BRENNAN & LETVIN, PLLC
24001 Greater Mack, St. Clair Shores, MI 48080-1408
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24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

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586-778-0900, Fax 586-778-1204

ARGUMENT

I. ADMISSION OF THE ORAL AND WRITTEN STATEMENTS BY TONY HINES IS REVERSIBLE ERROR BECAUSE ADMISSION VIOLATED THE CONFRONTATION CLAUSE

In Crawford vs. Washington, 541 U.S. _____; 124 S. Ct. 1354; 158 L Ed. 2d 177 (2004) the Supreme Court addressed the application of the Sixth Amendment Confrontation Clause to out-of-court statements proffered for use at trial. There the Defendant Michael Crawford stabbed a man who Defendant alleged had tried to rape his wife, Sylvia. Sylvia was questioned by police regarding the incident, and the police made a tape recording of her statements to the police describing the incident. Sylvia did not testify at trial because her testimony was barred pursuant to the Washington State Marital Privilege. However, pursuant to the hearsay exception for statements against penal interest, the State played Sylvia's tape-recorded statements to the jury at trial, despite the fact that Defendant had no opportunity to cross examine Sylvia. Id at 1356-1357. The jury convicted the Defendant of assault. The Washington Court of Appeals reversed the conviction, but the Washington Supreme Court reinstated the conviction. Id at 1358. The United States Supreme Court reversed the conviction, finding that the admission of Sylvia's tape recorded statements violated the Confrontation Clause. Id at 1374.

The Sixth Amendment's Confrontation Clause provides "[i]n all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The Court examined the Clause and reasoned that it applies to "witnesses", those who "bear testimony" against an accused. Id at 1364 (citing 1 N. Webster, An American Dictionary of the English Language (1828)). "Testimony", the Court stated, is typically a "solemn declaration or affirmation made for the purpose of establishing or proving some fact". Id. The Court also stated "an accuser who makes a formal

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24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id.

The Court explained that several definitions of "testimonial" statements exist, and cited two definitions from Briefs submitted in the case, and a definition utilized by the Court in a 1992 case. These definitions included "ex-parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the Defendant was unable to cross-examine, or similar pre-trial statements that declarants would reasonably expect to be used prosecutorially..." and "statements that were made under circumstances which would lead an objective witness reasonably to believe that a statement would be available for use at a later trial..." Id at 1364 (citations omitted). The Court found that statements taken by police officers during interrogations are testimonial under almost any standard, and stated "In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class."[FN4] FN4...We use the term "interrogation" in its colloquial, rather than any technical legal, sense." Id at 1365 (citation omitted).

The Court's examination of the history of the Sixth Amendment led the Court to conclude that the Sixth Amendment means exactly what it says. "The text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the Courts. Rather, the "right...to be confronted with the witnesses against him," Amdt. 6, is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding...As the English authorities above reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine. The Sixth Amendment therefore incorporates those limitations." Id at 1365-1366.

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24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

The Court examined Ohio vs. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L Ed. 2d 597 (1980), which was the Court's then most authoritative Confrontation Clause case. Roberts conditioned the admissibility of hearsay evidence on whether the evidence falls under a "firmly rooted hearsay exception" or whether it bears "particularized guarantees of trustworthiness". The Court examined the Roberts rationale and rejected it. Crawford, 124 S. Ct. At 1369-1370. The Court explained why the Roberts test is deficient, stating:

> "This test departs from the historical principals identified above in two respects. First, it is too broad; it applies the same mode of analysis whether or not the hearsay consists of ex-parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow; it admits statements that do consist of ex-parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.
>
> Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause....They offer two proposals; First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law–thus eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine--thus eliminating the excessive narrowness referred to above.
>
> In White[vs. Illinois, 502 U.S. 346, 112 S. Ct. 736; 116 L.Ed.2d 848 (1992)] we considered the first proposal and rejected it....Although our analysis in this case casts doubt on that holding, we not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition...."

Crawford, 124 S. Ct. 1354 at 1369-1370 (emphasis in original).

In addressing the definitions of "testimonial" and "non-testimonial" hearsay, the Court stated "Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law–as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial

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586-778-0900, Fax 586-778-1204

evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial". Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id at 1374 (footnote omitted).

Crawford thus examines the history of the Sixth Amendment and the extremely important core democratic value upon which it is based: a fair trial. Particularly clear is the evil at which the Amendment was aimed: the admission of statements at trial, particularly those gathered by the police and other authorities, where the statements were made ex-parte, and where the accused had no opportunity to cross-examine the declarant.

Pursuant to the above reasoning, admission of Tony Hines' oral and written hearsay statements at trial was reverseable error. He made statements to the police in response to police questions both in the police station (Tr. V p. 118-119) and in answer to questions posed to him by police officers thereafter ("See Narrative Report" dated November 27, 2000, and attached as **Exhibit E** to Defendant/Appellant's December 15, 2003 Application for Leave to Appeal). He had both a motive to fabricate and the capacity to fabricate, as the relationship between Tony Hines and Defendant Mr. Jackson was acrimonious, and as he waited approximately six hours after the alleged incident before driving to the police station without the alleged victim to make statements regarding the alleged incident. Moreover, the prosecutor failed to call Tony Hines to testify at the Preliminary Examination, and Tony Hines died before Trial. The statements are thus immediately suspect pursuant to the Sixth Amendment because they were made by someone who harbored personal animus against Mr. Jackson,

MUSILLI, BRENNAN & LETVIN, PLLC
24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

they were gathered by the police, they were made ex-parte, and they were never subject to cross-examination.

Pursuant to the prosecutor's Briefs to date, it is presumed that the prosecutor will assert that the statements at issue are admissible because they are "non-testimonial" hearsay, and admission of them was proper pursuant to the excited utterance hearsay exception set forth in MRE 803 (2) . The Court should note that the Prosecutor's April 1, 2004 submission to the Court intimates that since the Court of Appeals found that there was no evidence that the statements at issue were made as a result of questioning by the officers, this Court's inquiry should end there. (Prosecutor's April 1, 2001 Response to Defendant's Amended Application for Leave to Appeal at p. 17.) Mr. Jackson posits however that this Court is the final arbiter in this matter. Regardless, statements were given to the police, ex-parte, or at least two occasions, and the police report cited above reveals the testimonial nature of the statement, as they "were made under circumstances which would lead an objective witness reasonably to believe that the statement wold be available for use at a later trial." Even a lay person would understand that the statements at issue were made with the specific intention that the statements be available for use at a later trial.

The Court should also be cognizant of the devastating sequelae which necessarily would follow a determination that the statements at issue are admissible. Armed with such a holding, the police and other authorities would refuse to make tape recorded statements, and in fact could destroy with impunity those which did not support an official police report "incorporating" the statements. The police and other authorities would be subject to the temptation to characterize all statements regarding alleged criminal behavior as non-testimonial, and to insist that they are admissible at trial pursuant to the various hearsay exceptions. An admissibility ruling would also promote a policy, or at least an

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24001 Greater Mack, St. Clair Shores, MI 48080-1408
586-778-0900, Fax 586-778-1204

inclination on the part of the police and authorities, to call only police officers to testify at preliminary examinations, where the statements made to the officers wold not be subject to cross-examination. If the declarant later dies or becomes unavailable to testify at trial, a not uncommon occurrence, then the police or other authorities would take the position that the statements made were non-testimonial and therefore admissible. It is inconceivable that an accused's right to confront witnesses should ever be dependant upon a police officer's assertions that ex-parte statements made by an alleged witness, which were not tape recorded, are plain, non-responsive, narrative statements. Indeed Crawford rejected the proposal that the Confrontation Clause is only applicable to testimonial statements. This Honorable Court therefore should reject the Prosecutor's position out of hand.

CONCLUSION

For all of the above-stated reasons, and for the reasons set forth in Defendant's Application for Leave to Appeal and in Defendant's Supplemental Brief Informing the Court of New Dispositive Authority from the United States Supreme Court, Defendant Nicholas Jackson respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals Opinion affirming his conviction, order the Circuit Court to vacate the conviction, order Mr. Jackson's release from prison, and that the Court remand the matter to the Circuit Court for re-trial.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 7/23 20 04

By: ☒ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ Overnight Courier
☐ Certified Mail ☐ Other:

Signature

Dated: July 23, 2004

Respectfully submitted,

MUSILLI, BRENNAN & LETVIN, PLLC

By:
Ralph Musilli, P18132
Dennis M. Fuller, P40666